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No.
346

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CHARLES ELMORE DUNN
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IN THE

Supreme Court of the United States

OCTOBER TERM 1943

WASHINGTON BREWERS INSTITUTE, a corporation, *et al.*,
Petitioner (Appellant below),
vs.

UNITED STATES OF AMERICA,
Respondent (Appellee below).

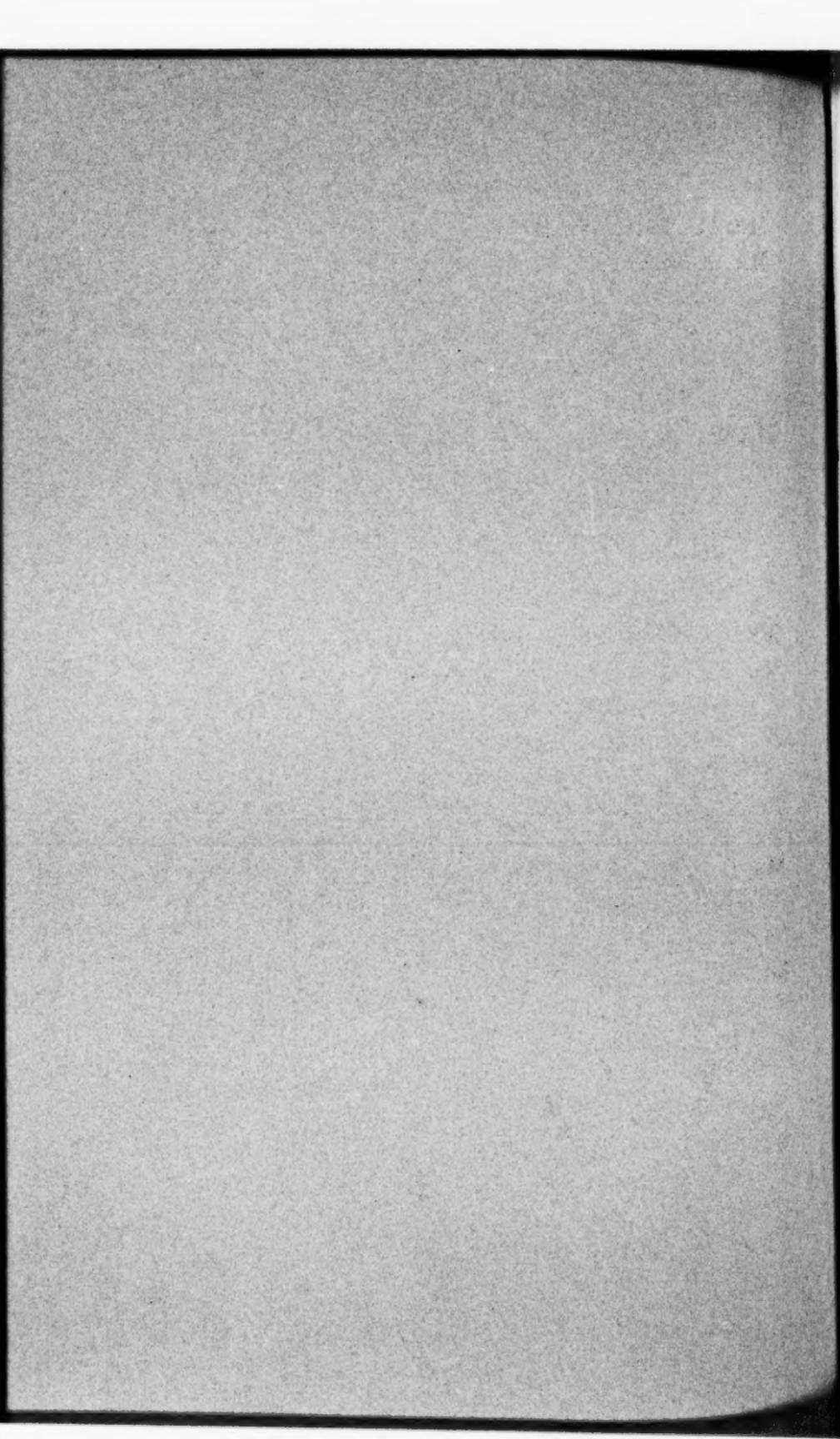
**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT AND
BRIEF IN SUPPORT OF PETITION**

WASHINGTON BREWERS INSTITUTE, *et al.*,
Petitioners,

By R. M. J. ARMSTRONG
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CASSIUS E. GATES
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TABLE OF CONTENTS

	<i>Page</i>
PETITION FOR WRIT OF CERTIORARI	1-7
A. Summary Statement of the Matter Involved.....	2
Questions Presented	3
B. Reasons Relied on for Allowance of the Writ.....	4
C. Prayer	6
BRIEF IN SUPPORT OF PETITION	9
I. Opinion Below	9
II. Jurisdiction	9
III. Statement of the Case	12
IV. Specification of Error	13
V. Argument	13
1. "Since the adoption of the Twenty-first Amendment the Federal Government has no jurisdiction over commerce among the states in intoxicants"	14
2. "At least, the Federal Government is without authority to legislate in that field when any state or territory has occupied the field by appropriate legislative action"	17
3. Inconsistencies in the Circuit Court opinion.....	18
4. Even under the interpretation adopted by the Circuit Court of Appeals, the indictment is lacking in essential allegations to state a violation of the Sherman Act and disclose jurisdiction	22
VI. Conclusion	26
Appendix I :	following page 27
Analysis of Liquor Control Acts and Regulations of Washington, Oregon, California and Idaho	1A
Appendix II	5A
Price Control Provisions	5A
Classification of Purchasers	13A
Container Control Provisions	14A
Responsibility for Wholesalers Conduct.....	15A
"Distressed" Beer Provisions	16A
Certificates of Approval or Compliance.....	20A

CASES CITED

	Page
<i>Adams Express Co. v. Kentucky</i> , 238 U.S. 190..13, 16	
<i>Arrow Distilleries, Inc. v. Alexander</i> , 109 F.(2d) 397	5
<i>Atlantic Cleaners and Dyers v. U. S.</i> , 286 U.S. 427	16
<i>Blitz v. United States</i> , 153 U.S. 308, 38 L. ed. 725	25
<i>Brown v. Keene</i> , 8 Pet. 115, 8 L. ed. 885	23
<i>Finch & Co. (Joseph S.) v. McKittrick</i> , 305 U.S. 395	15
<i>Finch & Co. (Joseph S.) v. McKittrick</i> , 23 F. Supp. 244	5
<i>Fleischer v. United States</i> , 302 U.S. 218, 82 L. ed. 208	24
<i>Flippen v. U. S.</i> , 121 F.(2d) 742	5
<i>Henderson v. New York</i> , 92 U.S. 259	16
<i>Indianapolis Brewing Co. v. Liquor Control Comm.</i> , 305 U.S. 391	15
<i>Jameson & Co. v. Morgenthau</i> , 307 U.S. 171	14, 16
<i>Mahoney v. Joseph Trinner Corp.</i> , 304 U.S. 401	15
<i>Mattingly v. N. W. Virginia R. R. Co.</i> , 158 U.S. 53, 39 L. ed. 894	24
<i>Robertson v. Cease</i> , 97 U.S. 646, 24 L. ed. 1057	24
<i>Schlitz Brewing Co. v. Johnson</i> , 123 F.(2d) 1016	5
<i>620 Church Street Building Corp., In re</i> , 299 U.S. 24	11
<i>State Board of Equalization v. Young's Market</i> , 299 U.S. 59	5, 11, 15, 19, 26
<i>Sugar Institute v. United States</i> , 297 U.S. 535	18
<i>U. S. v. Steffen</i> , 100 U.S. 82	16
<i>U. S. v. Colorado Wholesale, etc., Ass'n.</i> , 47 F. Supp. 160	5
<i>United States v. Cook</i> , 17 Wall. 174, 21 L. ed. 539	25
<i>United States v. Cruikshank</i> , 92 U.S. 542, 23 L. ed. 588	25
<i>U. S. v. Gulf Refining Co.</i> , 268 U.S. 542	11
<i>U. S. v. Halliday</i> , 3 Wall. (U.S.) 407	16

	<i>Page</i>
<i>United States v. Hutcheson</i> , 312 U.S. 219.....	25, 26
<i>U. S. v. Lanza</i> , 260 U.S. 377	15
<i>United States v. Morrissey</i> , 32 Fed. 147	24
<i>United States v. Standard Brewery</i> , 251 U.S. 210, 64 L. ed. 229	24
<i>Warner v. New Orleans</i> , 167 U.S. 467	11
<i>Wylie v. State Board</i> , 21 F. Supp. 604.....	5
<i>Ziffin, Inc. v. Reeves</i> , 308 U.S. 132	15
<i>Zukaitis v. Fitzgerald</i> , 18 F. Supp. 1000.....	5

TEXTBOOKS

27 Am. Jur. 621	24
27 Am. Jur. 668	25
31 C.J. 668	24
35 C.J.S. 913	24

STATUTES

Judicial Code, §240(a), 28 U.S.C. §347	11
Sherman Act, 26 Stat. 209, 15 U.S.C.A. 1	
.....2, 3, 4, 6, 10, 12, 18, 19, 20, 22, 23 U.S.C.A. 122	23
Webb-Kenyon Act, 37 Stat. 699, 49 Stat. 877, 27 U.S.C.A. 122	14
Wilson Original Packages Act, 26 Stat. 313, 27 U.S.C.A. 121	14
49 Stat. 977, 27 U.S.C.A. 201	14

CONSTITUTION OF THE UNITED STATES

Article I §8	16
Article XXI of Amendments	
.....3, 4, 5, 10, 12, 13, 16, 19, 21, 22	22

CONGRESSIONAL RECORD

76 Cong. Rec. 4141	14
76 Cong. Rec. 4143	14



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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED
STATES:

Washington Brewers Institute, Henry T. Ivers, H. J. Durand, Olympia Brewing Company, Peter G. Schmidt, Adolph D. Schmidt, Columbia Breweries, Inc., East Idaho Brewing Co., Inc., Joseph F. Lanser, Harry P. Lawton, E. Louis Powell, California State Brewers Institute, James G. Hamilton, Seattle Brewing & Malting Co., The Spokane Brewery, Inc., William H. Mackie, Rene Besse, Emil G. Sick, George W. Allen, Pioneer Brewing Co., Russell G. Hall, Bohemian Breweries, Inc., Edwin F. Theis, Idaho Brewers Institute, Steve T. Collins, Overland Beverage Co., Becker Products Co., Gus L. Becker, C. C. Wilcox, The Brewers Institute of Oregon, George F. Paulsen, Interstate Brewing Co., G. V. Uhr, Pacific Brewing & Malting Co., James E. Knapp, Regal Amber Brewing Co., Acme Breweries, Karl F. Schuster and William

P. Baker, jointly petition and each severally petitions that a writ of *certiorari* issue to review a judgment entered on the 13th day of August, 1943, by the United States Circuit Court of Appeals for the Ninth Circuit in a cause pending in that court entitled, "*Washington Brewers Institute, et al., Appellants, v. United States of America, Appellee, No. 10303,*" (R. 185 reported in 136 F.(2d) p., Advance Sheets).

A. Summary Statement of the Matter Involved

A Grand Jury within and for the Northern Division of the Western District of Washington, on May 5, 1941, returned an indictment charging the petitioners and others in two counts with violations of Secs. 1 and 3 of the Act of Congress approved July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," (26 Stat. 209), commonly known as the Sherman Act (R. 6).

Petitioners were duly and regularly arraigned and granted the opportunity of filing motions and demurrers directed to the indictment. Demurrers were filed by all petitioners (R. 38, 133, 135) and argued. The demurrers were overruled by the District Court (R. 52).

Petitioners entered pleas of *nolo contendere* and judgment and sentence was imposed by the court (R. 56-133 Inc.).

Petitioners appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the overruling of the demurrers by the District Court (R. 140-165).

The Circuit Court of Appeals for the Ninth Circuit

affirmed the action of the lower court (R. 185). This decision of the Circuit Court of Appeals your petitioners earnestly seek to review here.

Questions Presented

Such review presents the following questions:

(1) Since the adoption of the Twenty-first Amendment to the Federal Constitution has the Federal Government any jurisdiction over commerce among the several states or with the territories, in intoxicating liquor, other than to enforce the Twenty-first Amendment?

(2) Does the Twenty-first Amendment with respect to the regulation of the liquor traffic free the states from previous constitutional restraint (the Commerce Clause), and if so, are not the states restored to the status which they enjoyed prior to the adoption of the Constitution and the Commerce Clause thereof, and thus possessed of exclusive jurisdiction over commerce in this commodity?

(3) Since the adoption of the Twenty-first Amendment, has the Federal Government any authority to legislate in the field of regulating commerce in intoxicating liquor with respect of any state or territory which has occupied the field by appropriate legislative action?

(4) In view of the Twenty-first Amendment, if a state law has made a particular act illegal with respect to commerce in intoxicating liquor, can such act be charged as a violation of a Federal statute dealing with the same subject?

(5) Is an indictment under the Sherman Act, in-

volving intoxicating liquor, sufficient, which ignores and excludes the factor of State legislation?

(6) Will the law presume, in order to sustain Federal jurisdiction and the existence of a crime, that the acts charged have not been "commanded or implicitly encouraged" by State law?

If the answer to any of the questions 1 to 4 inclusive is in the affirmative, or to questions 5 and 6 is in the negative, the action of the District Court in overruling the demurrers and the affirmance thereof by the Circuit Court of Appeals was in error.

B. Reasons Relied on for Allowance of the Writ

(1) Questions are presented herein which have not been heretofore specifically determined by the Supreme Court of the United States. Since the adoption of the Twenty-first Amendment many of the states have enacted legislation for the control of the liquor traffic based on theories diametrically opposed to the theory of the Sherman Anti-Trust Act. These state laws have for their purpose the restriction and restraint of competition in the traffic in intoxicating liquor. The conflict existing between such state and Federal legislation has not been the subject of any decision of this court, nor has the delineation of the respective authority of the Federal and State governments with respect thereto been determined. Certain decisions of this court which will be hereinafter appropriately cited have dealt with the affirmative authority of the state to adopt legislation which prior to the Twenty-first Amendment would have been unconstitutional under the Commerce, Due Process and

Equal Protection Clauses. But the precise question here involved has not been directly raised or determined in any of those decisions.

(2) There exists a conflict between certain of the Circuit and District Courts, and confusion, with respect to the effect of the Twenty-first Amendment insofar as the power and authority of the State and Federal Governments are concerned.

Zukaitis v. Fitzgerald, 18 F. Supp. 1000;
Wylie v. State Board, 21 F. Supp. 604;
Joseph S. Finch & Co. v. McKittrick, 23 F. Supp. 244;
U. S. v. Colorado Wholesale, etc., Ass'n., 47 F. Supp. 160;
Arrow Distilleries, Inc. v. Alexander, 109 F.(2d) 397;
Flippen v. U. S., 121 F.(2d) 742;
Schlitz Brewing Co. v. Johnson, 123 F.(2d) 1016.

The differences which existed prior to *State Board of Equalization v. Young's Market*, 299 U.S. 59, as noted at page 60 have not been fully settled.

(3) It is a matter of national concern both to persons engaged in commerce in intoxicating liquor and to the governments of the several states to know to what extent any remaining authority in the Federal Government limits, affects or compliments the authority and sovereignty of the states in regulating commerce in intoxicating liquor. Unless and until this court determines that question, particularly with respect to the conflict which must obviously exist between state laws having as their purpose the limita-

tion or suppression of competition in the traffic in intoxicating liquor and the Sherman Anti-Trust Act, continued uncertainty will be produced.

Persons engaged in this commerce are placed in a position of double jeopardy where such a fundamental conflict exists, and this court ought to determine with certainty, by the policies of which sovereignty such persons must be guided.

C. Prayer

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the cause numbered and entitled in its docket, "No. 10303, *Washington Brewers Institute, et al., Appellants, v. United States of America, Appellee;*" and that the said decree of the said United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

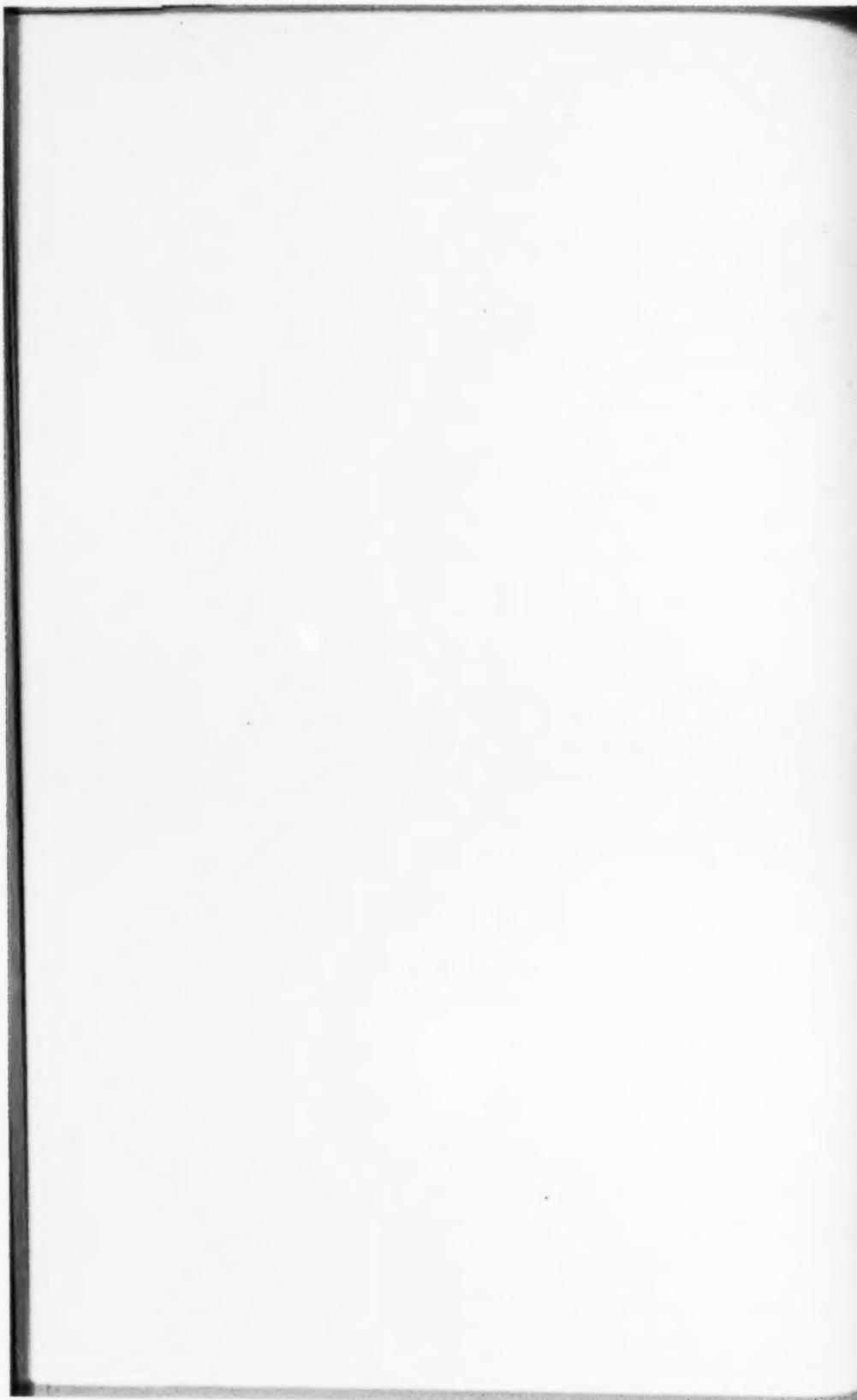
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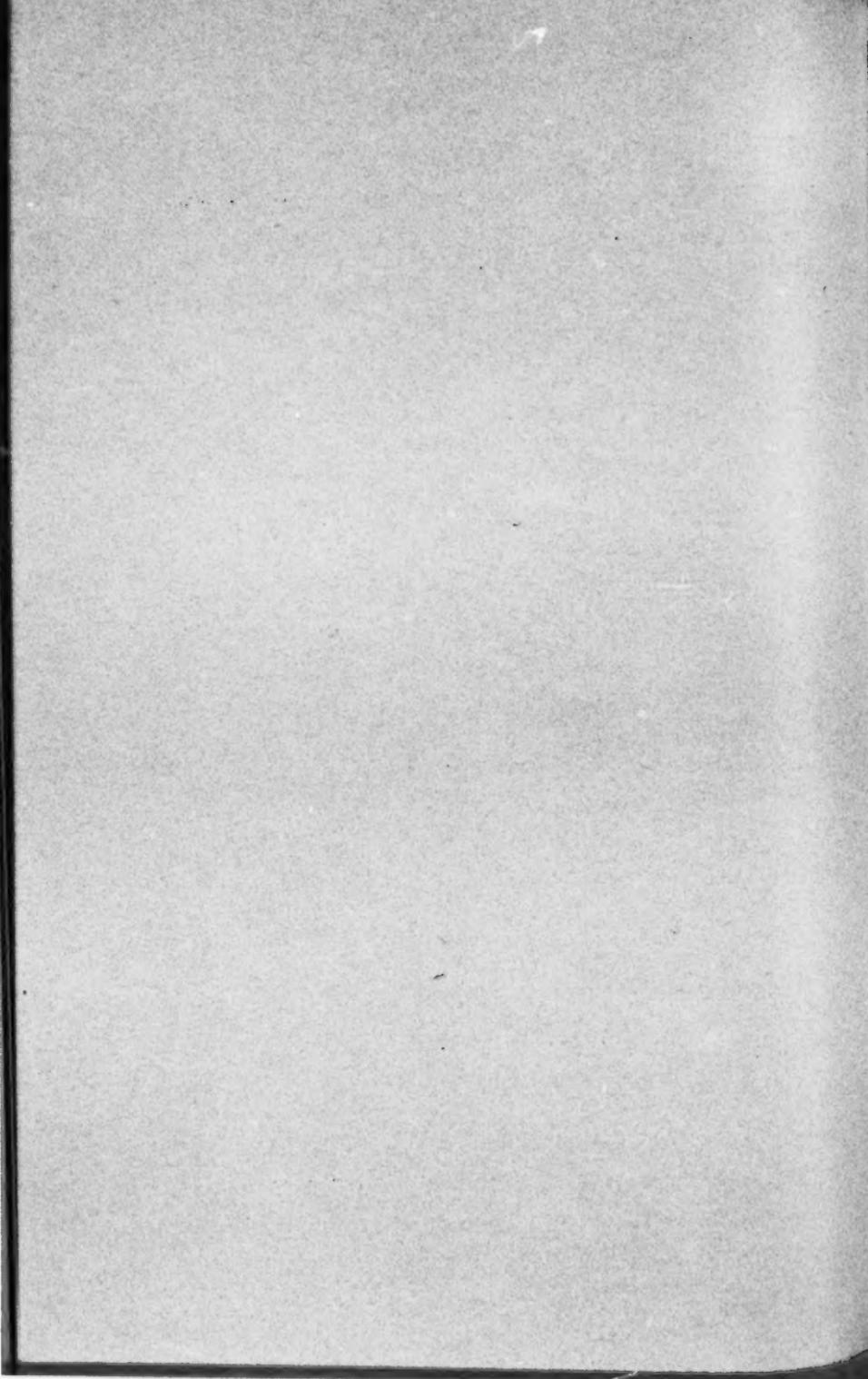
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit in this cause is reported in 136 F.(2d) (R. 174).

II.

JURISDICTION

(1) The date of the judgment to be reviewed is August 13, 1943 (R. 185).

(2) The specific contentions advanced and rulings made in the lower court which are relied on as the basis of this court's jurisdiction are:

(a) Since the adoption of the Twenty-first Amendment the Federal Government has no jurisdiction over commerce among the states in intoxicants. The Cir-

cuit Court, in summarily disposing of this contention said:

"But we think the amendment does not deprive the national government of all authority to legislate in respect of interstate commerce in intoxicants. There is nothing in the verbiage of the provision, and little in its legislative history, to support so broad a view." (R. 178-9) (136 F. (2d))

(b) At least, the Federal Government is without authority to legislate in that field (regulating commerce in intoxicants) when any state or territory has occupied the field by appropriate legislative action.

The Circuit Court, in disposing of this contention, recognized "the practically unlimited power of the states to regulate or prohibit the importation of alcoholic beverages, irrespective either of the Commerce or the Equal Protection Clause of the Constitution" (R. 177-8).

The court further held that while the Twenty-first Amendment "does not in terms transfer power to the states, it does free them from a previous constitutional restriction" (R. 180).

The Circuit Court further held that the state laws involved (summarized in appendices hereto) are, in many respects, incompatible with the policy of the Sherman Act, and "wherever such conflicts exist, the Sherman Act must give way, just as the Commerce Clause itself gives way in identical circumstances" (R. 181).

The Circuit Court held:

"Interstate commerce in liquor, not in violation

of state law, was left, as before, a matter of national concern." (R. 181)

The court further found the existence of state laws forbidding the restraints of trade or the fixing or maintaining of artificial and non-competitive prices, which laws are applicable to beer (R. 182). But, in spite of this finding, that the acts charged in the indictment were a violation of state laws, as noticed, and of its conclusion that if acts charged did violate such laws such commerce was not a matter of national concern, it upheld the conviction under the Sherman Act.

(c) The indictment involving intoxicating liquor is insufficient in that it does not negative the fact that the acts charged have been "commanded or implicitly encouraged" by state laws.

This contention was not noticed by the Circuit Court.

(3) The statutory provision under which jurisdiction is invoked is Sec. 240(a) of the Judicial Code, as amended (28 U.S.C.A., Sec. 347).

(4) The following cases are believed to sustain the jurisdiction of the Supreme Court:

State Board of Equalization v. Young's Market, 299 U.S. 59;

In re 620 Church Street Building Corp., 299 U.S. 24;

U. S. v. Gulf Refining Co., 268 U.S. 542;

Warner v. New Orleans, 167 U.S. 467.

III.

STATEMENT OF THE CASE

The petitioners are companies or corporations engaged in the manufacture of malt beverages, principally beer, state associations of such manufacturers, and officers of such manufacturing corporations and state associations, all situated and doing business in the states of Oregon, Washington, California, Idaho and Utah. They were charged by indictment returned in the District Court for the Northern Division of the Western District of Washington, with a conspiracy and combination in violation of the Sherman Anti-Trust Act (R. 6). Demurrsers were interposed on the ground that the indictment did not state facts sufficient to constitute an offense against the United States, and specifically did not state sufficient facts to constitute a violation of Secs. 1 and 3 of the Sherman Anti-Trust Act; that it does not appear from the indictment that the matters therein charged are within the jurisdiction of the Federal District Court, and that it affirmatively appears that the acts charged involved trade and commerce in beer, an intoxicating liquor within the meaning of Sec. 2 of the Twenty-first Amendment to the Constitution of the United States (R. 38). These demurrsers were overruled by the District Court (R. 52) and appeals were taken to the Circuit Court of Appeals (R. 140-165), after the entry of pleas of *nolo contendere* and the imposition of sentence by the District Court (R. 56-133). The Circuit Court, by its judgment and opinion, review of which is here sought, affirmed the action of the District Court in overruling said demurrsers.

IV.

SPECIFICATION OF ERROR

The Circuit Court of Appeals for the Ninth Circuit erred in affirming the action of the District Court in overruling the demurrers interposed by petitioners, and in affirming the several judgments of the District Court.

V.

ARGUMENT

Before the Circuit Court, three principal contentions were made by petitioners. Two of them were stated by the court as follows:

1. "Since the adoption of the Twenty-First Amendment the Federal Government has no jurisdiction over commerce among the states in intoxicants, or
2. "At least, the Federal Government is without authority to legislate in that field when any state or territory has occupied the field by appropriate legislative action."

An additional contention, not mentioned by the Circuit Court, may be stated as follows:

3. The indictment involving intoxicating liquor is insufficient in that it does not negative the fact that the acts charged have been commanded or implicitly encouraged by state laws.

I.

"Since the adoption of the Twenty-first Amendment the Federal Government has no jurisdiction over commerce among the states in intoxicants."

Adversely disposing of this contention, the Circuit Court relies upon

- (a) *Adams Express Co. v. Kentucky*, 238 U.S. 190, a decision long prior to the adoption of the Twenty-

first Amendment and interpreting the Webb-Kenyon Act (37 Stat. 699, 27 U.S.C.A. 122), and the Wilson Act (26 Stat. 313, 27 U.S.C.A. 121).

(b) *Jameson & Co. v. Morgenthau*, 307 U.S. 171, a decision involving foreign commerce and not commerce among the states, and

(c) Legislative history and congressional construction as evidenced by the passage of the Federal Alcohol Administration Act (49 Stat. 977, 27 U.S.C.A. 201).

In reaching this conclusion the Circuit Court ignored the meaning and effect of the Twenty-first Amendment, as understood by its authors in the Senate.

"* * * The purpose of Section 2 (of the Twenty First Amendment) is to restore to the states by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the states." (76 Cong. Rec. 4143)

"* * * When our Government was organized and adopted, the states surrendered control over and regulation of interstate commerce. This proposal (the Twenty First Amendment) is restoring to the states, in effect, the right to regulate a single commodity—namely, intoxicating liquor." (76 Cong. Rec. 4141)

In the Federal Alcohol Administration Act, Congress substantially recognized this construction of the Twenty-first Amendment, making the effectiveness of many of its regulatory provisions dependent upon the adoption by the states of the same provisions (27 U.S.C.A. 205, *et seq.*)

Inconsistent with its conclusion, the Circuit Court found that

"Originally, the regulation or suppression of the liquor traffic was a matter solely of local concern, except insofar as the authority of the states was circumscribed by the Commerce Clause.

* * * While it (the Twenty First Amendment) does not in terms transfer power to the states it does free them from a previous constitutional restraint."

Freeing of the states from the restraints imposed by the Commerce Clause could only be accomplished by removing from the Federal Government the authority granted by the Commerce Clause. If that authority is removed by the Twenty-first Amendment, then the states have exclusive jurisdiction, and no authority remains in the Federal Government under the Commerce Clause with respect to intoxicating liquor.

U. S. v. Lanza, 260 U.S. 377.

This conclusion is supported by the decisions of the Supreme Court interpreting the Twenty-first Amendment.

State Board of Equalization v. Young's Market, 299 U.S. 59;

Mahoney v. Joseph Trinner Corp., 304 U.S. 401;

Indianapolis Brewing Co. v. Liquor Control Comm., 305 U.S. 391;

Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395;

Ziffin, Inc. v. Reeves, 308 U.S. 132.

We do not deem it necessary to make any further comment on the Circuit Court's reliance upon the case

of *Adams Express Co. v. Kentucky, supra*. The Circuit Court seems, however, to have placed unusual reliance upon *Jameson & Co. v. Morgenthau*, 307 U.S. 171. As above noticed, this decision involved only foreign commerce, and not commerce among the states. The Twenty-first Amendment does not deal, or purport to deal, with foreign commerce. While the grant of authority over foreign and interstate commerce is contained in the same clause of the Constitution (Art. I, Sec. 8), the two powers are essentially different and entirely separate.

Atlantic Cleaners and Dyers v. U. S., 286 U.S. 427.

The Twenty-first Amendment could not refer to foreign commerce because under our system of government there can be no importation into a state in foreign commerce, but such commerce is limited only to importation into the United States, and such commerce is between citizens of the United States, not citizens of a state and citizens of a foreign nation. See

U. S. v. Steffen, 100 U.S. 82, at 96;

Henderson v. New York, 92 U.S. 259, at 270;

U. S. v. Halliday, 3 Wall (U.S.) 407, at 417.

There is nothing in the *Jameson* case to indicate that the court considered that anything but an importation into the United States was involved. It is petitioners' contention that this decision is wholly inapplicable to the questions here involved.

2.

"At least, the Federal Government is without authority to legislate in that field when any state or territory has occupied the field by appropriate legislative action."

To a limited degree, the Circuit Court conceded the correctness of this contention. The court said:

"Thus the broad theory of the Sherman Act—that trade should be free of artificial restraints—is in many respects incompatible with the policy of state liquor control legislation; and whenever such conflicts exist the Sherman Act must give way, just as the Commerce Clause itself gives way in identical circumstances. Where invocation of that Act tends to hamper or interfere with the enforcement of state laws regulatory of transportation or importation of intoxicants, the Act is unenforceable. By the terms of its own fundamental laws *the National Government has disabled itself from prosecuting as an offense that which a state has commanded or implicitly encouraged as a means of controlling the traffic in intoxicants within its borders.*"
(Emphasis added)

Assuming this to be a correct statement of the law, it does not support the court's ultimate conclusion. A reading of the state laws (set out in appendices) makes it apparent that the acts charged in the indictment were either "commanded or implicitly encouraged."

Indeed, the acts *commanded* by the state laws were held by this court to constitute a combination and conspiracy in restraint of trade and a violation of the

Sherman Act in *Sugar Institute v. United States*, 297 U.S. 535.

Despite a statement to the contrary by the Circuit Court, petitioners do affirm that the purpose of the state laws and regulations is to fix uniform prices. The vehicle created, and which petitioners are commanded to use, is apt and could have no other purpose or result. The device is not new. Whenever it has been used either by agreement, as in the *Sugar Institute* case, *supra*, or by command of government, as in the *National Industrial Recovery Act* (48 Stat. 195), the purpose has been to fix uniform prices.

3.

Inconsistencies in the Circuit Court opinion

The Circuit Court, after determining that the Twenty-first Amendment removed the constitutional restraint previously imposed on the states by the Commerce Clause, concluded:

"Interstate commerce in liquor, not in violation of state laws, was left, as before, a matter of national concern."

From this, the court obviously meant that where such commerce did violate state law it was not a matter of national, but exclusively of local concern, hence without the jurisdiction of the Federal Government. Apparently unmindful of the effect of this conclusion, the court states:

" * * * the states (here involved) have laws forbidding restraints of trade or the fixing or maintaining of artificial and noncompetitive prices for commodities generally, which laws are

applicable to beer as well as to other commodities."

If the court's interpretation of the law is correct, then the acts charged in the indictment are a violation of state law, and if petitioners are to be charged with the violation of any law it could only be of the state laws, not of the Sherman Act.

Where a state has a comprehensive act regulating the traffic in liquor, containing mandatory restraints of trade and also has a general statute forbidding restraints of trade, it has certainly completely occupied the field covered by the Sherman Act with respect to intoxicating liquor.

Under the Twenty-first Amendment who shall say to what extent the liquor law imposing restraints modifies or repeals the law forbidding restraints? It must be the state, the dominant lawmaker in that field.

State Board of Equalization v. Young's Market, supra.

The foregoing excerpts from the Circuit Court's opinion demonstrate an obvious inconsistency in its reasoning. The entire opinion is based upon a series of illogical conclusions springing from an apparent misconception of the necessary effect of the Twenty-first Amendment.

Petitioners recognize that the language used in the Twenty-first Amendment is not in keeping with the general language used in the Constitution in the granting to or limiting of powers of the Federal Government, or the reservation of powers to the states. By the language of the Twenty-first Amendment the

Federal Government is admittedly prohibited from exercising authority which was once granted to it by the Commerce Clause, and as a necessary corollary, to the extent of such prohibition the states have been relieved of the restrictions previously imposed upon them by the Commerce Clause. Undoubtedly, the language which would either, in terms, withdraw the authority from the Federal Government or affirmatively reserve or return such power to the states might admit of less confusion, but it could not change the result.

The Circuit Court recognizes, as it must under the decisions of this court, that the states have been freed from the restrictions of the Commerce Clause, which, of course, can only mean that the states are again the exclusive sovereign in the field of regulating commerce in intoxicating liquor. In its attempt to escape this conclusion, the Circuit Court held that so long as "interstate commerce in liquor" does not violate "state laws" it remains "a matter of national concern" and, therefore, subject to the jurisdiction of the Federal Government under the Commerce Clause.

This means that if interstate commerce in liquor is carried on in *conformity or compliance* with state law it is within the jurisdiction of the Federal Government. It can mean nothing else. Yet, the court itself held that insofar as the state laws here involved conflict with the Sherman Anti-Trust Act and the acts of the petitioners are done pursuant to and in compliance with such state laws, then the jurisdiction of the Federal Government fails and the Anti-Trust Act is in-

applicable. These conclusions are not only inconsistent, but contradictory.

It seems obvious to us that the confusion results from a failure to accept the simple meaning and effect of the Twenty-first Amendment. The Federal Government, since the Twenty-first Amendment, has jurisdiction only to enforce the Twenty-first Amendment by prohibiting the transportation or importation into any state or territory of intoxicating liquor in violation of the laws of such state or territory. This power and jurisdiction the Federal Government derives from the Twenty-first Amendment, and not from the Commerce Clause. In order to exercise its jurisdiction there must be found to be an importation or transportation which *violates* not a Federal but *a state law*. Beyond this the Federal Government has no jurisdiction over the commerce in intoxicating liquors among the states.

Thus, it is petitioners' contention that the Federal Government has jurisdiction over commerce in intoxicating liquors among the states, or with the territories, when such commerce *violates* the laws of such states or territories. The Federal Government has no jurisdiction under the Commerce Clause or the Twenty-first Amendment so long as the importation *does not violate* any state law, and certainly where such commerce *is in compliance* with state law. Petitioners believe this contention to be self-evident and consistent with the decisions of this court heretofore noticed.

4.

Even under the interpretation adopted by the Circuit Court of Appeals, the indictment is lacking in essential allegations to state a violation of the Sherman Act and disclose jurisdiction.

The opinion of the Circuit Court of Appeals recognizes that State laws pertaining to intoxicating liquors are paramount, and that if conflict exists between the State laws and the Sherman Act, "The Sherman Act must give way." The opinion says in part:

"Thus the broad theory of the Sherman Act—that trade should be free of artificial restraints—is in many respects incompatible with the policy of state liquor-control legislation; and wherever such conflicts exist the Sherman Act must give way, just as the commerce clause itself gives way in identical circumstances. Where invocation of that Act tends to hamper or interfere with the enforcement of state laws regulatory of the transportation or importation of intoxicants, the Act is unenforceable. By the terms of its own fundamental law the national government has disabled itself from prosecuting as an offense that which a state has commanded or implicitly encouraged as a means of controlling the traffic in intoxicants within its borders." (R. 181)

What would ordinarily constitute a crime under the Sherman Act and confer Federal jurisdiction, may not do so in the case of intoxicating liquors. It will not do so if State laws have "commanded or implicitly encouraged" the acts charged. Since the enactment of the Twenty-first Amendment, the Sherman Act has

by implication contained an exception that may be paraphrased as follows:

"Except, however, that in the case of intoxicating liquor, nothing done under the authority of the laws of any State governing the delivery into or use therein of intoxicating liquor, shall come within the scope of this Act or constitute a violation thereof."

The indictment in this case treats beer the same as any other commodity, and assumes that Federal jurisdiction (commerce) exists by reason of interstate shipment alone and that a crime has been committed under the Sherman Act if, in conjunction with interstate shipment, acts have been committed in restraint of trade. It entirely disregards the factor of State legislation.

The very fact that the charge concerns beer makes the bare allegation that there have been interstate shipments, insufficient to establish Federal jurisdiction. Federal jurisdiction will not exist *unless* consistent with State legislation.

Jurisdiction of a Federal Court is never presumed. It must be clearly and distinctly alleged. Facts must be pleaded which, if true, will positively establish jurisdiction. Jurisdiction cannot be left to conjecture, inference or presumption.

In *Brown v. Keene*, 8 Pet. 115, 8 L. ed. 885, Chief Justice Marshall said:

"The decisions of this court require that the averment of jurisdiction shall be positive; that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient

that jurisdiction may be inferred argumentatively from the averments."

In *Robertson v. Cease*, 97 U.S. 646, 24 L. ed. 1057, the Supreme Court said:

"As the jurisdiction of the Circuit Court is limited, in the sense that it has none except that conferred by the Constitution and laws of the United States, the presumption now, as well as before the adoption of the Fourteenth Amendment, is, that a cause is without its jurisdiction unless the contrary affirmatively appears."

See also

Mattingly v. N. W. Virginia R. R. Co., 158 U.S. 53, 39 L. ed. 894;

United States v. Morrissey, 32 Fed. 147, 152;

35 C.J.S. 913;

31 C.J. 668.

All the facts alleged in this indictment could be true and yet no offense exist and the Federal Court not have jurisdiction.

"If the facts alleged may all be true, and yet constitute no offense, the indictment is insufficient. * * * Every material fact and essential ingredient of the offense—every essential element of the offense—must be alleged with precision and certainty."

27 Am. Jur. 621.

Fleischer v. United States, 302 U.S. 218, 82 L. ed. 208;

United States v. Standard Brewery, 251 U.S. 210, 64 L. ed. 229.

"Every ingredient of which the offense is composed must be accurately and clearly alleged."

United States v. Cook, 17 Wall. 174, 21 L. ed. 539.

"It cannot 'be left in doubt or to mere inference, from the words of the indictment, whether the offense charged was one within Federal cognizance'."

Blitz v. United States, 153 U.S. 308, 38 L. ed. 725, 728;

United States v. Cruikshank, 92 U.S. 542, 23 L. ed. 588.

Thus, under the very interpretation adopted by the Circuit Court of Appeals, and admitted as correct by respondent, the indictment is insufficient. In respondent's brief before the Circuit Court of Appeals, in answer to this point, reliance was placed exclusively on a quotation from 27 Am. Jur. 668 and the case of *United States v. Hutcheson*, 312 U.S. 219. Neither is applicable. The text has reference to an affirmative plea of the Statute of Limitations and cites as authority the case of *United States v. Cook*, 17 Wall. 168, 21 L. ed. 538. This opinion clearly states the rule that is applicable to the case at bar as follows:

"Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that

no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed."

The case of *United States v. Hutcheson* is not in point. It holds that the facts pleaded determine whether a crime is stated, irrespective of the particular statute that the pleader conceived had been violated.

Although this ground for insufficiency of the indictment was vigorously pressed by brief and upon oral argument, the opinion of the Circuit Court of Appeals does not pass upon or even mention it. It presents an important and hitherto undecided question under the Twenty-first Amendment.

VI. CONCLUSION

Petitioners believe that the same conflict and confusion with respect to the effect of the Twenty-first Amendment which existed in the several Circuit and District Courts prior to the decision in *State Board of Equalization v. Young's Market, supra*, continues to exist. We believe that the decision of the Circuit Court of Appeals for the Ninth Circuit which we here seek to review is a further demonstration of that confusion. This state of the law not only jeopardizes those who must be governed by it, but it also leaves both the Federal and State Governments without any guide in determining the respective policies by which they shall deal with this ever-troublesome subject. Sixteen states have adopted the so-called monopoly system of controlling the traffic in intoxicating liquor.

Other conflicts similar to the one here involved are almost certain to arise unless this court provides both the Department of Justice of the Federal Government and the several state commissions and legislatures with a clear and unmistakable rule as to the extent or limits of their respective authority.

We earnestly pray that this petition for a writ of certiorari be granted.

Respectfully submitted

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APPENDIX I.

ANALYSIS OF LIQUOR CONTROL ACTS AND REGULATIONS OF WASHINGTON, OREGON, CALIFORNIA AND IDAHO

(Laws referred to herein are as follows: Washington—Rem. Rev. Stat. and Regulations of Washington Liquor Control Board; Oregon—Comp. Laws Ann. and Regulations of Oregon Liquor Control Comm.; California—Chap. 330, Laws 1935, as amended by Ch. 758, Laws 1937, Rules State Board Equal.; Idaho—Ch. 132, Laws 1935, as amended by Ch. 48, Laws 1937 and Ch. 242, Laws 1939).

The laws of Washington and Oregon establish a liquor control board or commission with general and specific powers to adopt regulations which when adopted have the force and effect of law (Wash. 7306-79; Ore. 24-106).

The California statute, at various places, empowers the State Board of Equalization to make rules concerning specific subjects. These are, however, not gathered under any one head in any one section.

Licenses are required for all persons manufacturing, importing or buying or selling intoxicating liquor. Each act defines manufacturer or brewer, importer, wholesaler, and various classes of retailers (Wash. 7306-23, *et seq.*; Ore. 24-118 *et seq.*; Cal. Sec. 5, *et seq.*; Idaho, Secs. 1 and 3).

Three of the laws require salesmen to have licenses, define their rights and duties, and prohibit anyone from soliciting or performing the work of a salesman

2A

without possessing such license (Wash. 7306-23-1; Ore. 24-118-16 (6); Idaho Sec. 6 (8).

Each of the statutes requires a license to import beer into the state, and prohibits anyone except the holders of such licenses from importing (Wash. 7306-23-G; Ore. 24-118 (1) and (6); Cal. Secs. 2 (k) and 6 (d); Idaho, Sec. 1 (c) 3).

Common carriers are required to comply with provisions of the acts in the transportation of intoxicating liquor (Wash. 7306-56; Cal. Secs. 49 and 49.2; Idaho, Secs. 1 (i) and 4 (3) (a).)

The contents and requirements for labeling are regulated (Wash. 7306-44; Ore. 24-146; Cal. Sec. 53.5 and Rule 30).

Advertising by various means is subjected to regulation (Wash. 7306-43 and Reg. 22-25 and 119 to 127; Ore. Reg. 7; Cal. Secs. 53.6 and 55; Idaho, Sec. 6 (a)).

The extension of credit is prohibited or regulated (Wash. Reg. 41 and 51 (a); Ore. Reg. 9; Cal. Sec. 55.8).

Each of the acts and regulations adopted pursuant thereto prohibits a manufacturer, wholesaler or importer from having any financial interest, direct or indirect, in any licensed retail business, or in any property on which a retail business is conducted, prohibits the giving or advancing of money or money's worth to any retailer under any arrangement, prohibits a manufacturer, wholesaler or importer from having any interest in any retail license, and prohibits a manufacturer or wholesaler from selling liquor at retail, prohibits the soliciting, giving or offering

3A

of any gifts, discounts, loans of money, premiums, rebates or furnishing, renting, lending or selling any equipment, fixtures or supplies, and prohibits a retail licensee from soliciting or receiving or accepting any of the foregoing (Wash. 7306-90, Reg. 18; Ore. 24-137, 24-202 to 205, Reg. 10 (d); Cal. Sec. 54; Idaho Sec. 6 (9)).

Consignment sales are prohibited in California (Sec. 54) and exclusive contracts between manufacturer or wholesaler and retailer are prohibited in Washington (Reg. 17). Sales for future delivery are prohibited in Oregon (Reg. 10 (d)).

In Appendix II we have set out the texts of the price control and container control provisions, the sections covering manufacturers' responsibilities for wholesalers' conduct, distressed beer, and certificates of approval or compliance.

The laws and regulations contain conditions surrounding warehousing, importation and exportation of beer other than those above referred to (Wash. Reg. 52 to 55 inc.; Cal. Secs. 24.26 and 24.27, Rule 10 and Sec. 6 (1); Idaho Sec. 6 (4)).



APPENDIX II.

(Laws referred to herein are as follows: Washington—Rem. Rev. Stat. and Regulations of Washington Liquor Control Board; Oregon—Comp. Laws Ann. and Regulations of Oregon Liquor Control Comm.; California—Chap. 330, Laws 1935, as amended by Ch. 758, Laws 1937; Idaho—Ch. 132, Laws 1935, as amended by Ch. 48, Laws 1937 and Ch. 242, Laws 1939).

PRICE CONTROL PROVISIONS**WASHINGTON LAW**

"Sec. 7306-79. *Board has power to make regulations.* 1. For the purpose of carrying into effect the provisions of this act according to their true intent or of supplying any deficiency therein, the board may make such regulations not inconsistent with the spirit of this act as are deemed necessary or advisable. All regulations so made shall be a public record and filed in the office of the secretary of state, together with a copy of this act, shall forthwith be published in pamphlets, which pamphlets shall be distributed free at all liquor stores and as otherwise directed by the board, and thereupon shall have the same force and effect as if incorporated in this act.

"2. Without thereby limiting the generality of the provisions contained in subsection (1), it is declared that the power of the board to make regulations in the manner set out in that subsection shall extend to

* * * * *

"r. prescribing the conditions, accommodations and qualifications requisite for the obtaining of licenses to

sell beer and wines, and regulating the sale of beer and wines thereunder;"

"(49) *Beer Price Posting—Filing Contracts.* (a) *Price Posting.* Within the meaning of this regulation, the term 'zone' shall mean such 'zones' as shall from time to time be fixed and adopted by the board as trade areas within and for which price postings shall be made and filed as in this regulation provided.

"Every licensed brewer and every beer importer shall file with the board at its office in Olympia price postings showing the wholesale prices at which any and all brands of beer manufactured by such brewer or imported by such beer importer shall be sold in each and every zone, which prices shall be uniform for all retail licensees in any particular zone. All price postings shall be made upon forms prepared and furnished by the board and shall set forth:

"(1) All brands, types, packages and containers of beer offered for sale by such brewer or beer importer.

"(2) The delivered sale price thereof to retail licensees within each and every zone, including allowances, if any, for returned empty containers.

"No beer wholesaler shall sell or offer to sell any package or container of beer to any retail licensee at a price differing from the price for such package or container as shown in the price posting filed by the brewer manufacturing such beer or by the beer importer importing such beer and then in effect.

"No price posting shall become effective until ten days after the actual filing thereof with the board.

"No price postings involving quantity discounts shall be made.

* * * * *

"(b) *Filing Contracts.* Every licensed brewer shall file with the board at its office in Olympia a copy of

every written contract and a memorandum of every oral agreement which such brewer may have with any beer wholesaler handling beer manufactured by such licensed brewer, which contracts or memorandums shall contain all terms of sale, including all regular and special discounts; all advertising, sales and trade allowances; all commissions, bonuses or gifts and any and all other discounts or allowances. Whenever changed or modified the changed or modified contracts or memorandums shall forthwith be filed with the board.

"Every beer importer shall file with the board at its office in Olympia a copy of every written contract and a memorandum of every oral agreement which such importer may have with any out-of-state brewery whose beer such importer imports and with any beer wholesaler handling beer imported by such importer, which contracts or memorandums shall contain all terms of sale, including all regular and special discounts; all advertising, sales and trade allowances; all commissions, bonuses or gifts and any and all other discounts or allowances. Whenever changed or modified the changed or modified contracts or memorandums shall forthwith be filed with the board.

"No licensed brewer shall sell beer manufactured by such brewer to any beer wholesaler until copies of such written contracts or memorandums of such oral agreements with such wholesaler are on file with the board.

"No beer importer shall sell any beer imported by such importer to any person whatsoever until copies of such written contracts or memorandums of such oral agreements with the out-of-state brewer manufacturing such beer are on file with the board; nor shall any beer importer sell any beer imported by such importer to any beer wholesaler until copies of

such written contracts or memorandums of such oral agreements with such beer wholesaler are on file with the board.

"(c) All price postings, contracts and memorandums filed as required by this regulation shall at all times be open to inspection to all trade buyers within the state of Washington and shall not within any sense be considered confidential.

"(d) Any provision of this regulation may by order of the board be suspended or modified without notice to meet emergencies."

OREGON LAW

"Sec. 24-106. *Liquor traffic: Property: Commercial transactions: Licenses: Taxes: Enforcement of law: Adoption of regulations: Advertising by dealers: Contracts: Insurance.* The function, duties and powers of the commission shall include the following:

* * * * *

"(d) To control the manufacture, possession, sale, purchase, transportation, importation and delivery of alcoholic liquor in accordance with the provisions of this Act;

* * * * *

"(h) To adopt such regulations as are necessary and feasible for carrying out the provisions of this Act, and to amend or repeal such regulations. When such regulations are adopted as herein provided they shall have the full force and effect of law."

"REGULATION 10. A—*Posting of Beer Prices*—Licensees of the commission engaged in the business of soliciting the sales of, selling or distributing malt beverages for resale within the state of Oregon shall file with the commission at its Portland, Oregon, office a written schedule (in quadruplicate) of prices to

be charged by such licensee for all malt beverages offered for sale within the state of Oregon, which said schedule of prices shall be uniform for the same class of trade buyers in the same trade area within the state and shall set forth, (a) all brands and types of products offered for sale, (b) the delivered sale price for each size of container to retail licensees in each trade area of the state, (c) prices or maximum allowance or discounts to wholesale licensees, and (d) any allowance granted for returned containers. Such schedule of prices shall be filed with the commission on or before the 20th day of the month preceding the month in which such prices shall be in effect. A schedules of prices so filed may be changed or modified by filing with the commission at its Portland office, on or before the 20th day of any month, an amended schedule of prices which amended schedule when filed shall become effective on the first day of the following month; provided, however, that if a licensee files a schedule of prices, for all malt beverages, or an amended schedule of prices on or before the 20th of the month, all other licensees having a schedule of prices on file may file amended schedules to meet such new schedule of prices, but not lower than such new scheduled prices, at any time thereafter and before the 1st day of the month immediately following; and such amended schedules so filed shall be in effect from and after the first day of such month. Such schedule of prices shall not be withdrawn, changed or modified except in the manner hereinabove provided. When a price schedule, or an amendment or modification thereof, is filed it shall be open to public inspection. From and after the effective date of price schedules filed as hereinabove provided, the licensee filing such schedule shall make sales at the prices scheduled and at no other prices. If any licensee shall make a sale

of malt beverages at any price which is a departure or variance from such licensee's posted price for such beverage such sale shall be regarded and construed as the giving of financial assistance within the meaning of the Oregon liquor control act, as amended, Chapter 490, Oregon Laws, 1937, and the regulations of the Oregon liquor control commission.

"(2) Notwithstanding the foregoing provisions, a licensee may be permitted to make sales at other than posted prices for the purpose of closing out a brand of malt beverages, providing the licensee shall first apply in writing to the commission. Such application shall contain the brand name, the quantities of each size of container and the price thereof and shall contain a statement that the licensee will not handle such items for a period of twelve (12) months thereafter. Upon the filing of such application the Administrator shall prescribe the terms and conditions under which such closeout sales may be made, which shall include the name of the proposed vendee.

"(3) During the emergency created by the war, the Administrator is hereby authorized and directed, to receive at any time from a licensee authorized to sell or distribute malt beverages for resale, a schedule of prices for any brand or kind of malt beverages not previously offered for sale by such licensee and not already posted and being sold in the same trading area, and upon the filing of such schedule of prices to permit the sale of such malt beverages in sealed containers (bottles) immediately thereafter and without regard to provisions of Regulation 10 hereinabove set out; provided, however, that after the initial filing of a schedule of prices as in this paragraph provided, thereafter amendments to such schedule shall be filed in accordance with paragraphs 1 and 2 of Regulations 10. (Par. (3) as added August 14, 1942, effective August 24, 1942)."

CALIFORNIA LAW

"Sec. 38e. Each manufacturer, importer and wholesaler of beer shall forthwith file and thereafter maintain on file with the board, in triplicate and in such form as the board may provide a written schedule of selling prices charged by such licensee for beer sold and distributed by such licensee within the State of California for delivery and use therein; provided, however, that such schedule of prices so filed, may be changed or modified from time to time by the licensee filing the same, by filing with the board a new and complete schedule of such prices or an amendment thereto of changed or modified prices as the board may by regulation require. The first schedule of prices filed by a licensee shall be effective immediately upon filing but an amendatory schedule or amendments to a prior filed schedule shall not become effective until ten (10) days after the filing date thereof; provided, that if any licensee has filed a new schedule to meet lower posted and filed competing prices in a trade area, and such prices thus posted are not lower than such competing prices sought to be met, then such new schedule or amendments shall go into effect immediately if such competing prices are already effective, or at the same time as such competing prices become effective. Such price schedules so filed shall be subject to public inspection and shall not in any sense be considered confidential and each said licensee shall retain in his licensed premises for public inspection a copy of his effective posted and filed schedule. Upon the filing of an original schedule of prices and after the effective date of any schedule of amendatory prices, all prices therein stated shall be strictly adhered to by the filing licensee and any departure or variance therefrom by a licensee of his prices so filed and posted and in effect shall constitute

and be a misdemeanor, providing that the violation of posted prices as to each article covered by a particular sale or transaction shall not constitute a separate and single misdemeanor or violation of this section as to each such article, but each such sale or transaction involving a violation of posted prices under this section shall constitute but a single offense or violation of this section regardless of the number of articles covered by such sale or transaction.

"Any director, officer, agent or employe of any licensee who knowingly assists or aids in the violation of this section or any effective posted price or any rule or regulation of the board passed to carry out the provisions of this section shall be guilty of such violation equally with the licensee.

"The board may adopt such other rules and regulations as will foster and encourage the orderly wholesale marketing and wholesale distribution of beer; provided, that no such action shall be taken by the board except after public hearings and ten (10) days notice to all licensed manufacturers of beer in California of the time and place of such hearing and of the character of the action intended to be taken by the board."

IDAHO LAW

"Sec. 6. *Unlawful practices.* * * * *

"(5) All licensees of the commissioner engaged in the business of selling or distributing beer for resale within the State of Idaho shall file with the commissioner a written schedule of prices to be charged by such licensee for beer sold or distributed within the State of Idaho, which schedule of prices shall be uniform for the same class of buyers in the same trade area within the State and shall set forth (a) all brands and types of products offered for sale; (b) the

delivered sale price thereof in the several trade areas of the state to the various classes of buyers; and (c) any allowance granted for returned containers. Such schedule of prices so filed may be changed or modified from time to time by filing with the commissioner a new schedule of prices, not less than ten days prior to the effective date thereof, and upon the filing of said new prices the commissioner shall give a notice thereof to all licensees as appear of record, selling or distributing beer within the State of Idaho. Such scheduled prices so filed may not be withdrawn prior to their effective date and upon becoming effective shall remain in effect for a minimum period of ten days. Such price schedules so filed shall be subject to public inspection and shall not be considered confidential. Upon the filing of the original schedule of prices, and after the effective date of any schedule of prices amendatory thereto, all prices therein stated shall be adhered to strictly, and any departure or variation therefrom shall be regarded and construed as the giving of financial assistance within the meaning of this Act."

CLASSIFICATION OF PURCHASES

Each of the laws define and separately license manufacturers, wholesalers (or distributors), importers and retailers as described in Appendix I *supra*.

Each of the price posting provisions referred to and quoted in this appendix require different price treatment for each class of trade buyer in each trade area or zone.

Each law requires that the identity of wholesalers and retailers be kept separate as set forth in Appendix I.

In addition California has the following provision:
"Sec. 38e. * * * *

"No manufacturer, importer or wholesaler mentioned in this section shall be prohibited the right of choice of customers, nor shall any such licensee be prohibited from dividing his customers into functional classes and establish different prices for the same article for such different functional classes being based upon the manner in which such classes sell beer, as wholesaler or retailer."

CONTAINER CONTROL PROVISIONS

Washington

"Sec. 7306-69. 1. The board, subject to the provisions of this Act and the regulations, shall

* * * * *

"d. determine the nature, form and capacity of all packages to be used for containing liquor kept for sale under this Act;"

"Reg. 44. *Packages—Classification.* No manufacturer, distributor or wholesaler shall, without permission of the board, adopt or use any packages or containers for beer differing in sizes and capacities from the following classification for taxing purposes, to-wit:

"Barrels—Whole barrels, $\frac{1}{2}$ barrels, $\frac{1}{4}$ barrels.

"Packages—12 11-oz., 12 12-oz., 24 11-oz., 24 12-oz., 12 22-oz., 12 24-oz., 6 64-oz., 12 32-oz., 12 64-oz., 24 32-oz., 48 11-oz., 48 12-oz."

California

"Sec. 53.6. * * * * No beer intended for sale in the State of California, except for export, shall be contained in bottles, jugs or cans having a capacity of more than 64 ounces, nor shall beer in bottles, jugs or cans of a capacity in excess of 64 ounces be sold

to or purchased by an on-sale or off-sale licensee in the State of California, provided that nothing in this paragraph shall be construed to prohibit the possession or sale by a qualified licensee of draft or unpasteurized beer from or in metal or wood kegs of a capacity of three and one-half (3½) gallons or more."

Idaho

*"Sec. 6. Unlawful practices. * * * **

"(6) No dealer or wholesaler shall purchase, receive or resell any beer, except in the original container as prepared for the market by the brewer at the place of manufacture. No brewer, dealer or wholesaler, shall, without permission of the commissioner, adopt or use any container for beer, differing in size from the following:

"11 oz. of beer	whole barrels
12 oz. of beer	half-barrels
22 oz. of beer	quarter-barrels
24 oz. of beer	eight-barrels
32 oz. of beer	
64 oz. of beer."	

RESPONSIBILITY FOR WHOLESALERS' CONDUCT

Washington

"7306-27-D. Every licensed brewer, domestic winery and licensed beer importer shall be responsible for the conduct of any licensed beer wholesaler in selling, or contracting to sell, to retail licensees, beer or wine manufactured by such brewer, domestic winery or imported by such beer importer. Where the board finds that any licensed beer or wine wholesaler has violated any of the provisions of this Act or of the regulations of the board in selling or contracting to sell beer or wine to retail licensees, the board may, in addition to any punishment inflicted or imposed upon such whole-

saler, prohibit the sale of the brand or brands of beer or wine involved in such violation to any or all retail licensees within the trade territory usually served by such wholesaler for such period of time as the board may fix, irrespective of whether the brewer manufacturing such beer or the beer importer importing such beer actually participated in such violation."

California

"Sec. 38e. * * * *

"Any director, officer, agent or employee of any licensee who knowingly assists or aids in the violation of this section or any effective posted price or any rule or regulation of the board passed to carry out the provisions of this section shall be guilty of such violation equally with the licensee."

"DISTRESSED" BEER PROVISIONS

Washington

"(50) *Bad Order Claims.* Bad order claims shall be made, adjusted and record thereof preserved as follows:

"(1) No bad order claim shall be allowed except by a brewer or beer importer;

"(2) No bad order claim shall be accepted unless the same shall be made by the retailer within ten days after the defect in the beer or container has been discovered;

"(3) No bad order claim shall be accepted unless the same is made by the retailer in quadruplicate upon forms furnished by the board;

"(4) After the claim has been made out in quadruplicate, one copy (blue) shall be torn from the book and retained by the retailer; one copy (yellow) shall

be torn from the book and retained by the wholesaler in those cases where the wholesaler acts as agent of the brewer in accepting the claim; the original and one copy (pink) shall be torn from the book and forwarded to or retained by, the brewer or beer importer for action upon the claim;

"(5) At the time of making the final adjustment of the claim, the brewer or beer importer shall mail to the board the pink copy, endorsing thereon the action taken by the brewer or beer importer, together with a certification that in his opinion the claim was valid to the amount allowed;

"(6) All adjustments of bad order claims shall be made by check issued by the brewer or beer importer and payable to the retailer, bearing the bad order claim number or numbers for which adjustment is made;

"(7) All documentary evidence relating to the claim shall be preserved by the retailer and brewer or beer importer for two years after the date of submission of the claim;

"(8) No brewer or beer importer shall allow, nor shall any retailer make claim for, a bad order claim unless the container or the beer is in fact defective."

Oregon

"REGULATION 10—A (2) Notwithstanding the foregoing provisions, a licensee may be permitted to make sales at other than posted prices for the purpose of closing out a brand of malt beverages, providing the licensee shall first apply in writing to the commission. Such application shall contain the brand name, the quantities of each size of container and the price thereof and shall contain a statement that the licensee will not handle such items for a period of twelve (12) months thereafter. Upon the filing of

such application the Administrator shall prescribe the terms and conditions under which such close-out sales may be made, which shall include the name of the proposed vendee.

* * * * *

"C—Bad Order Claims.—No licensee of the commission engaged in the sale of wine or malt beverages for resale within the state shall grant or allow any credit to a licensee of the commission on account of any claimed defect in any wine or malt beverage or container thereof unless such claim for credit shall be approved by the commission. The claim shall be made on forms obtained from the commission and in the following manner:

"1. The claimant (retailer) shall fill out the space provided in the lower left hand corner of the bad order claim, making original and three copies as provided in the bad order claim book, and mail the original copy (white) to the Oregon liquor control commission, 2505 S. E. 11th Ave., Portland, Oregon.

"2. The second (pink) and the third (yellow) copies shall be mailed or delivered immediately to the wholesaler from whom the distressed stock was purchased. The second copy (pink) shall be retained by the wholesaler.

"3. The third copy (yellow) shall be completed by the wholesaler on the space thereon provided after the inspection and approval or disapproval of the distressed stock has been made by him at the retailer's premises. This copy shall then be forwarded to the Oregon liquor control commission, 2505 S. E. 11th Ave., Portland, Oregon.

"4. The fourth or blue copy shall be retained by the claimant (retailer).

"Faulty or distressed beer or wine for which claim

is made shall be held at the retailer's premises until such time as a representative of the commission makes inspection thereof. When the claim is inspected or approved, the retailer will destroy the product in the presence of the inspector. Inspection will not be made until the commission receives the yellow copy from the wholesaler. The claiming or allowance of any fictitious or false claim in this connection shall be regarded by the commission as an act of rendering or receiving financial assistance and shall subject licenses of the offending parties to suspension or revocation at the option of the commission."

California

"Sec. 55.5 (a) No contract relating to the sale or resale of any alcoholic beverage which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such alcoholic beverage and which is in fair and open competition with alcoholic beverages of the same general class produced by others shall be deemed in violation of any law of this State by reason of any of the following provisions which may be contained in such contract:

* * * * *

"(b) Such provisions in any contract shall be deemed to contain or imply conditions that such alcoholic beverage may be resold without reference to such agreement in the following cases:

"(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such alcoholic beverage; providing, however, that at the place of any such sale and upon the goods sold and in any advertisement in connection therewith public notice is given of the character of such sale as a 'close out sale'; provided further, that such alcoholic beverage

is first offered to the manufacturer or vendor thereof at the original invoice price at least ten days before it is offered for sale to the public;"

CERTIFICATES OF APPROVAL OR COMPLIANCE

Washington

"7306-23-F (2) No beer wholesaler nor beer importer shall purchase any beer not manufactured within the State of Washington by a brewer holding a license as a manufacturer of malt liquors from the State of Washington, and/or transport or cause the same to be transported into the State of Washington for resale therein, unless the brewer or manufacturer of such beer has obtained from the Washington State Liquor Control Board a certificate of approval, as hereinafter provided. The certificate of approval herein provided for shall not be granted unless and until such brewer or manufacturer of malt liquors shall have made a written agreement with the board to furnish the board, on or before the tenth day of each month, a report under oath, on a form to be prescribed by the board, showing the quantity of beer sold or delivered to each licensed beer importer during the preceding month, and shall further have agreed with the board, that such brewer or manufacturer of malt liquors and all general sales corporations or agencies maintained by it, and all trade representatives or agents of such brewer or manufacturer of malt liquors, and of such general sales corporations and agencies, shall and will faithfully comply with all laws of the State of Washington pertaining to the sale of intoxicating liquors and all rules and regulations of the Washington State Liquor Control Board. If any brewer or manufacturer of malt liquors shall, after obtaining such certificate, fail to submit such report, or if such brewer or manufacturer of malt liquors or

general sales corporation or agency maintained by it, or any representative or agent thereof, shall violate the terms of such agreement, the board shall, in its discretion, revoke such certificate."

California

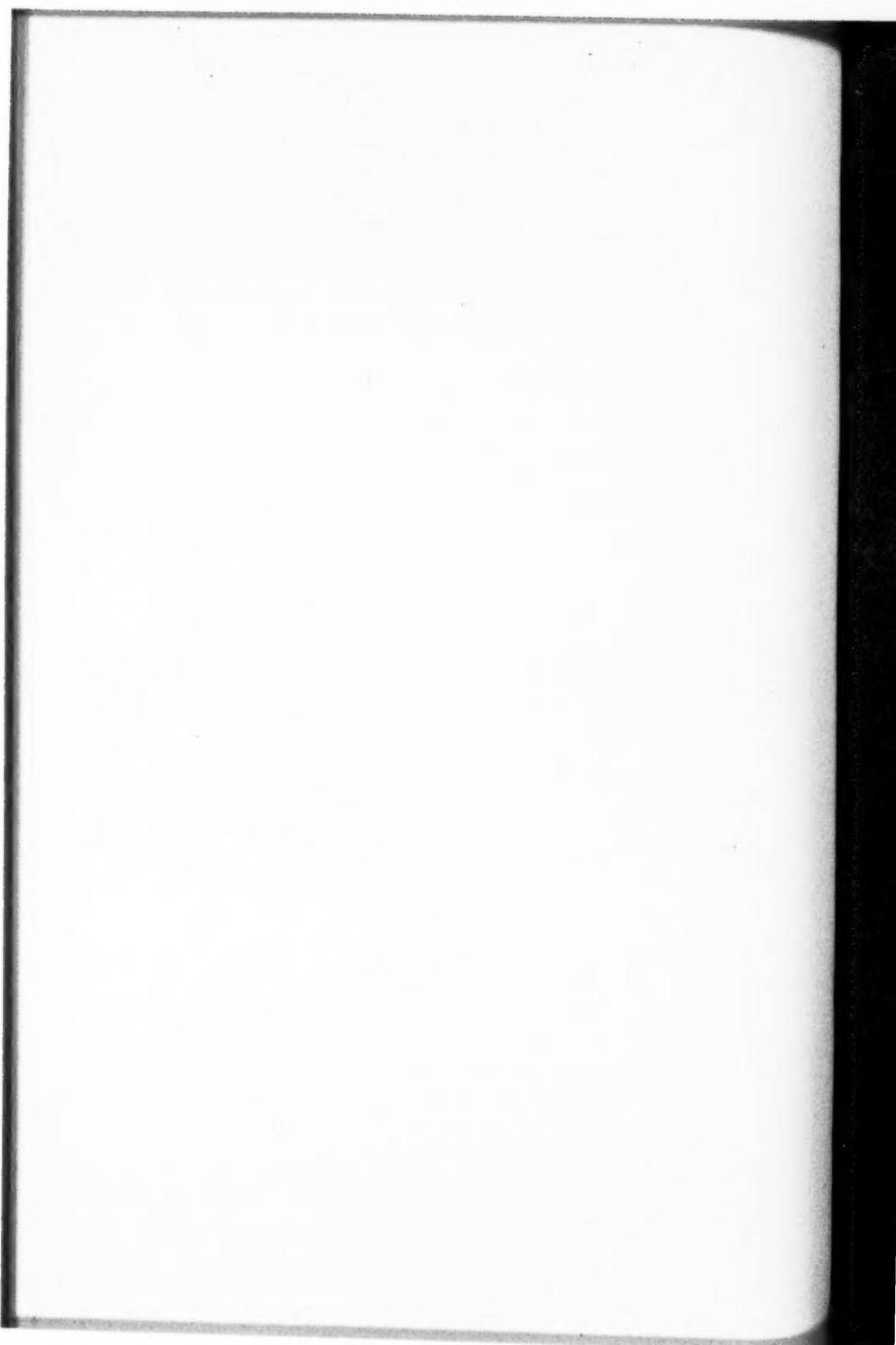
"Rule 29. On and after July 1, 1941, no beer wholesaler nor beer importer shall purchase any beer not manufactured within the State of California by a manufacturer holding a license as a beer manufacturer from the State of California, or transport or cause the same to be transported into the State of California for resale therein, unless the manufacturer of such beer has obtained from the board and holds a valid unrevoked and unsuspended certificate of compliance. A certificate of compliance shall be granted when such manufacturer of beer shall have made a written agreement with the board to furnish to the board, on or before the fifteenth day of each month, a report under oath, on a form to be prescribed by the board, showing the quantity of beer sold or delivered by such manufacturer to each licensed beer importer in this State during the preceding month and shall further have agreed with the board, that such manufacturer of beer and all general sales corporations or agencies owned and maintained by it shall and will faithfully comply with all laws of the State of California pertaining to the sale of alcoholic beverages and all rules and regulations of the board. If any such manufacturer of beer shall, after obtaining such certificate, fail to submit such report, or if such manufacturer or general sales corporation or agency owned and maintained by it shall violate the terms of such agreement, the board may suspend or revoke the certificate of compliance in the manner provided by the Alcoholic Beverage Control Act for

the suspension or revocation of licenses, and after a hearing which shall be held in the City of Sacramento or in such other county seat in this State as the board determines to be convenient to the holder of the certificate. No fee shall be charged for such certificate of compliance. But same must be renewed annually on or before July 1st of each year hereafter."

Idaho

"Sec. 6(2). No wholesaler or dealer shall purchase in, or import into, the State of Idaho, any beer, whether manufactured within or without the State of Idaho, by anyone holding a license by the commissioner as a brewer of beer, or as a dealer, and/or transport or cause the same to be transported into or within the State of Idaho, for resale therein, unless the brewer or dealer of such beer has obtained from the commissioner a certificate of aproval as herein-after provided. The certificate of approval herein provided for shall not be granted unless and until such brewer or dealer shall have made a written agreement with said commissioner to furnish to said commissioner on or before the fifteenth day of each month, a report, under oath, on a form to be prescribed by the commissioner, showing the quantity of beer sold by him within the State of Idaho during the preceding month, and shall have further agreed with said commissioner that such brewer or dealer, and all general sales corporations or agencies maintained by such brewer or dealer, and all trade representatives or agencies of such brewer or dealer, shall and will faithfully comply with all of the provisions of the laws of the State of Idaho relating to the regulation and control of the manufacture, sale and distribution of beer, and all rules and regulations adopted pursuant thereto. If any such brewer or dealer shall, after obtain-

ing such certificate, fail to submit such report, or, if any such brewer or dealer, or any general sales corporation or agency maintained by such brewer or dealer, shall violate the terms of such agreement, the commissioner shall give said brewer or dealer not less than fifteen days' notice, by registered mail, of such violation, and to appear before said commissioner and show cause, if any he has, why his certificate of approval should not be revoked, at which time the dealer or brewer may appear before the commissioner and introduce such evidence as he may have concerning said violation, and if said commissioner shall find, upon such hearing, that such brewer or dealer shall have violated any of the provisions of the Act, or any rules or regulations adopted pursuant thereto, he may in his discretion, and in addition to the other penalties herein described, revoke such certificate of approval, or he may suspend the same for a period of time not to exceed six months."



INDEX

	Page
Opinion below-----	1
Jurisdiction-----	1
Question presented-----	2
Constitutional provision and statute involved-----	2
Statement-----	3
Argument-----	4
Conclusion-----	9

CITATIONS

Cases:

<i>Arrow Distilleries, Inc. v. Alexander</i> , 109 F. (2d) 397, certiorari denied, 310 U. S. 646-----	6
<i>Finch & Co. v. McKittrick</i> , 23 F. Supp. 244, aff'd 305 U. S. 395-----	5, 7
<i>Flippin v. United States</i> , 121 F. (2d) 742-----	7
<i>Indianapolis Brewing Co. v. Liquor Commission</i> , 305 U. S. 391-----	5
<i>Jameson v. Morgenthau</i> , 307 U. S. 171-----	4, 5
<i>Javierre v. Central Altamericana</i> , 217 U. S. 502-----	8
<i>Mahoney v. Triner Corp.</i> , 304 U. S. 401-----	5
<i>Maple Flooring Association v. United States</i> , 268 U. S. 563-----	8
<i>McKelvey v. United States</i> , 260 U. S. 353-----	8
<i>Parker v. Brown</i> , 317 U. S. 341-----	8
<i>Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.</i> , 205 U. S. 1-----	8
<i>Schlitz Brewing Co. v. Johnson</i> , 123 F. (2d) 1016, affirming 33 F. Supp. 176-----	6
<i>State Board v. Young's Market Co.</i> , 299 U. S. 59-----	5
<i>Sugar Institute v. United States</i> , 297 U. S. 553-----	8
<i>United States v. Colorado Wholesale, etc. Ass'n</i> , 47 F. Supp. 160-----	6
<i>Wylie v. State Board</i> , 21 F. Supp. 604-----	7
<i>Zifrin, Inc. v. Reeves</i> , 308 U. S. 132-----	5
<i>Zukaitis v. Fitzgerald</i> , 18 F. Supp. 1000-----	7
Constitution:	
Twenty-First Amendment-----	2

	Page
Statutes:	
Federal Alcohol Administration Act (49 Stat. 977, 1965, 27 U. S. C. 201 <i>et seq.</i>) Sec. 5 (27 U. S. C. 205)-----	4, 5
Sherman Act:	
Sec. 1 (26 Stat. 209, 15 U. S. C. 1)-----	2
Sec. 3 (38 Stat. 731, 15 U. S. C. 14)-----	3

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 346

WASHINGTON BREWERS INSTITUTE, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 174) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 13, 1943 (R. 185). The petition for a writ of certiorari was filed on September 13, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Twenty-first Amendment and subsequently enacted state liquor control legislation none of which authorized concerted action to fix prices, bar prosecution under the Sherman Act of a conspiracy to fix prices in the interstate distribution of beer.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Section 2 of the Twenty-First Amendment to the Federal Constitution, which provides:

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 1 of the Sherman Act (26 Stat. 209, 15 U. S. C. 1), which provides in part as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The pertinent portions of statutes of California, Idaho, Oregon, and Washington, respectively, relating to the sale of beer in those states, are set forth in Appendix II of petitioners' brief.

STATEMENT

Petitioners were indicted for conspiring to fix the price of beer sold in interstate commerce in an area embracing the States of California, Idaho, Oregon, and Washington (R. 5).¹ Demurrers were filed in which petitioners contended that the Twenty-First Amendment deprived the Federal Government of all power independently to regulate interstate commerce in intoxicating beverages, and also that in those states where the Amendment had been followed by liquor control legislation, all federal legislation grounded upon the commerce clause was repealed to the extent that such legislation purported to regulate the conduct of the liquor industry (R. 38, 135). The demurrers were overruled (R. 52); pleas of *nolo contendere* were entered; and petitioners were fined various amounts (R. 56-133). Appeals to the Circuit Court of Appeals for the Ninth Circuit challenged only the sufficiency of the indictment to charge an

¹ The indictment also contained a count (R. 29) charging a conspiracy to fix the price of beer shipped to the Territory of Alaska in violation of Section 3 (38 Stat. 731, 15 U. S. C. 14) of the Sherman Act, but petitioners' contentions are primarily directed to the first count, in which the charge outlined above was made.

offense against the United States (R. 140-168).

The Circuit Court of Appeals affirmed the judgment of the district court (R. 174-184). It held that the Twenty-First Amendment "does not deprive the national government of all authority to legislate in respect of interstate commerce in intoxicants" (R. 178), and that, even though the Amendment might require the Sherman Act to yield to inconsistent state liquor legislation, the laws of none of the states in which the petitioners acted "sanction combinations among producers having as their purpose the fixing of uniform and artificial beer prices" (R. 181-182).

ARGUMENT

1. In *Jameson v. Morgenthau*, 307 U. S. 171, the claim that the Federal Alcohol Administration Act (49 Stat. 977, 1965, 27 U. S. C. 201 *et seq.*) was invalid because the Twenty-first Amendment gave the states "complete and exclusive control over commerce in intoxicating liquors" (p. 173), was held by this Court to be so lacking in substance that a three-judge court had no jurisdiction to hear it. The complaint there sought to enjoin the Secretary of the Treasury from enforcing labeling regulations issued pursuant to subsection (e) of Section 5 of that Act (27 U. S. C. 205 (e)) against a dealer seeking to release certain whiskey from customs. This subsection applied to "interstate or foreign com-

merce," and the suggestion made by the petitioners here that the views expressed in that case were limited to the validity of the Act as a regulation of foreign commerce ignores the indiscriminate treatment of interstate and foreign commerce embodied in the statute itself.² Neither the terms nor the history of the Twenty-first Amendment support the contention that it deprived Congress of all regulatory powers over intoxicating liquor in interstate commerce, and petitioners' argument in that respect is as insubstantial as that rejected in the *Jameson* case.

This Court has considered the effect of the Twenty-first Amendment on state legislation in a series of five cases beginning with *State Board v. Young's Market Co.*, 299 U. S. 59, and continuing through *Ziffrin, Inc. v. Reeves*, 308 U. S. 132.³ In each case it has upheld the right of the states to control traffic in liquor within their borders in a manner consistent with the fullest exercise of their police powers, even though such regulation results in import or export restrictions which

² Section 5 of the Act (27 U. S. C. 205), which deals with unfair competition and unlawful practices, uses the phrase "in interstate or foreign commerce" to define offenses involving the use of exclusive outlets, tied houses, commercial bribery and consignment sales respectively dealt with in subsections (a), (b), (c) and (d), in addition to the labeling offenses dealt with in subsection (e).

³ The others are *Mahoney v. Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co. v. Liquor Commission*, 305 U. S. 391, and *Finch & Co. v. McKittrick*, 305 U. S. 395.

might have been thought to violate the commerce clause of the Federal Constitution prior to the Twenty-first Amendment. None of these cases even suggests that the Twenty-first Amendment divested the Federal Government of all independent power to regulate interstate commerce in alcoholic beverages. In *Arrow Distilleries, Inc. v. Alexander*, 310 U. S. 646, this Court denied review of a judgment of the Seventh Circuit Court of Appeals, 109 F. (2d) 397, sustaining the validity of the Federal Alcohol Administration Act against the contention that the Amendment had such an effect.⁴

2. Petitioners (p. 5) cite seven cases in support of the proposition that "There exists a conflict between certain of the Circuit and District Courts, and confusion, with respect to the effect of the Twenty-first Amendment insofar as the power and authority of the State and Federal Governments are concerned." The decisions cited include the *Arrow* case, noted above, and are not in conflict either with each other or with the decision below. The two which construe the Sherman Act⁵ sustain the application of the Act to commerce in liquor and beer, respectively. Two more which

⁴ The petition in the *Arrow* case relied on this contention as a reason for granting the writ.

⁵ *United States v. Colorado Wholesale, etc., Assn.*, 47 F. Supp. 160 (D. Colo.); *Schlitz Brewing Co. v. Johnson*, 123 F. (2d) 1016 (C. C. A. 6), affirming 33 F. Supp. 176 (E. D. Tenn.).

construe the effect of the Twenty-first Amendment on state legislation⁶ do so in harmony with its construction by this Court. The remaining two⁷ construe neither the Sherman Act nor the Twenty-first Amendment.

3. Petitioners' argument that the state liquor laws have overridden the Sherman Act is not supported by reference to any state laws which authorize combinations to establish liquor prices. The state statutes quoted in the appendix to the petition under the heading, "Price Control Provisions" (pp. 5A-13A) do not provide for the fixing of prices either by the state or by private interests. They merely require that contracts be filed and prices posted with the state regulatory authority, and that the prices charged by each brewer or beer importer shall be uniform for the same class of buyer within a particular area. Such statutes hardly justify a private combination to fix prices, particularly in view of anti-trust laws in each of the states, which are applicable to beer as well as to other commodities.⁸ Petitioners claim that "the purpose of the state laws and regulations is to fix uni-

⁶ *Finch & Co. v. McKittrick*, 23 F. Supp. 244 (W. D. Mo.), affirmed, 305 U. S. 395; *Wylie v. State Board*, 21 F. Supp. 604 (S. D. Calif.).

⁷ *Flippin v. United States*, 121 F. (2d) 742 (C. C. A. 10); *Zukaitis v. Fitzgerald*, 18 F. Supp. 1000 (W. D. Mich.).

⁸ These laws are referred to in the opinion of the Circuit Court of Appeals (R. 182).

form prices" (Pet. p. 18). A reading of the statutes demonstrates plainly that their object was uniformity in the price charged by each brewer or importer, so as to prevent discrimination between customers purchasing his products. The statutes do not even remotely suggest that the elimination of price competition between competitors was to be authorized, or that uniformity of prices throughout the industry was the desideratum.

Petitioners suggest that the price-posting statutes command or encourage conduct which has been held to violate the Sherman Act in *Sugar Institute v. United States*, 297 U. S. 553. But that case was not concerned with the mere publication of price information (cf. *Maple Flooring Association v. United States*, 268 U. S. 563), nor with the compulsory furnishing of data to a state regulatory body (cf. *Parker v. Brown*, 317 U. S. 341). In any event, petitioners were not indicted for such conduct, nor for anything else sanctioned by the state laws.

4. Petitioners argument (pp. 22-26) that the indictment was insufficient because it failed to negative the existence of inconsistent state liquor laws is obviously without substance. *McKelvey v. United States*, 260 U. S. 353; *Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1, 10; *Javierre v. Central Altamaria*, 217 U. S. 502, 508, and cases cited. Such an issue,

alone, would not, in any event, warrant review by this Court.

CONCLUSION

The decision below is not in conflict with any decision of this Court or with any decision cited in the petition. The fundamental constitutional question presented has already been held to be without substance in the *Jameson* case. It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,

Solicitor General.

WENDELL BERGE,

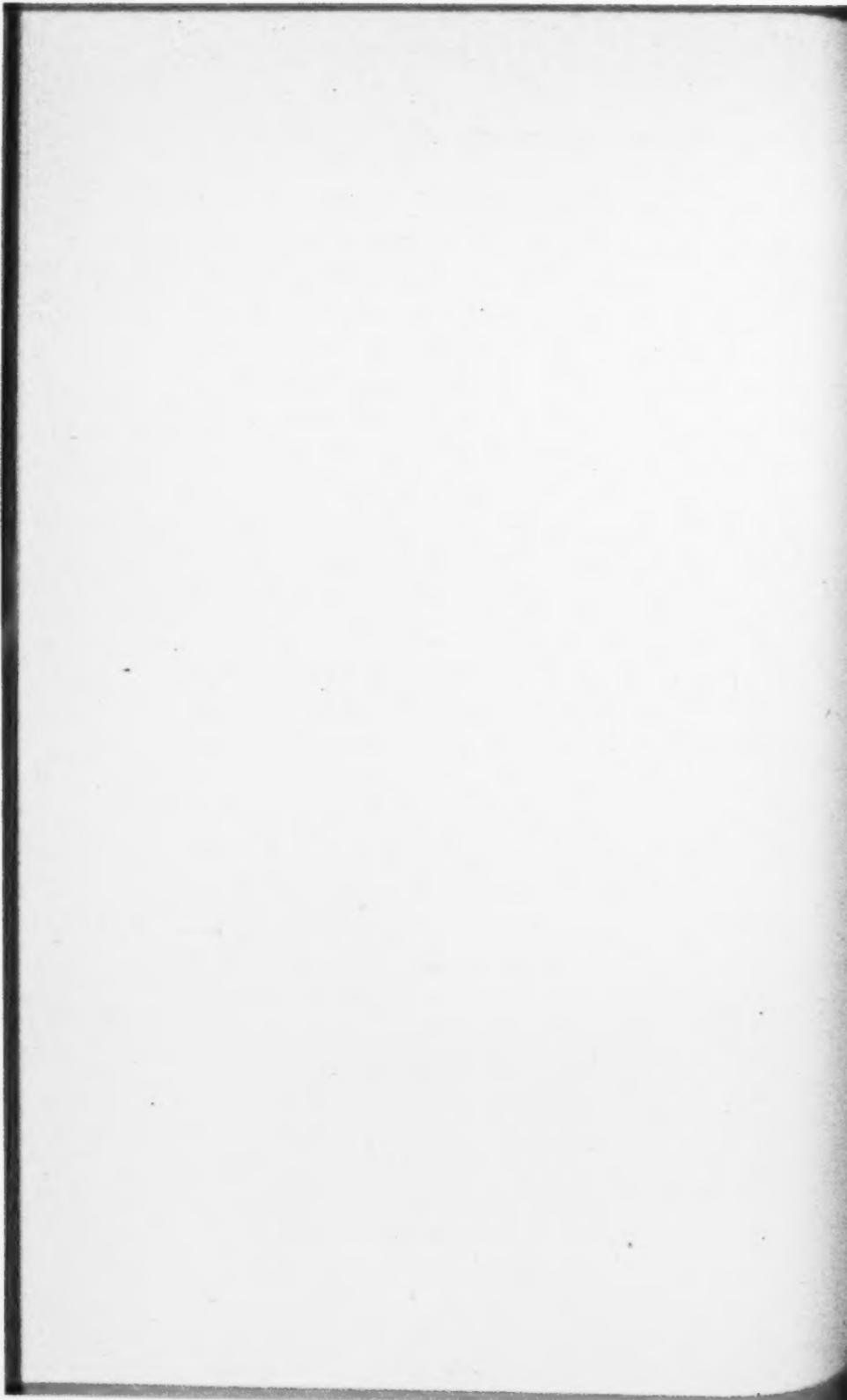
Assistant Attorney General.

ROBERT L. STERN,

ROBERT L. WRIGHT,

Special Assistants to the Attorney General.

OCTOBER 1943.



(13) OCT 6 1943

CHARLES ELMORE DROPLIN
CLERK

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1943

No. **346**

WASHINGTON BREWERS INSTITUTE, a corporation, et al.,

Petitioner (*Appellant below*),

VS.

UNITED STATES OF AMERICA,

Respondent (*Appellee below*).]

**BRIEF OF THE STATE OF WASHINGTON
AS AMICUS CURIAE**

THE STATE OF WASHINGTON,
as amicus curiae,

By SMITH TROY,
Attorney General of the State of Washington,

GEORGE DOWNIER,
Assistant Attorney General of the State of Washington,

Counsel for the State of Washington.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

IN THE
SUPREME COURT
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OCTOBER TERM, 1943

No.....

WASHINGTON BREWERS INSTITUTE, a corpora- }
tion, et al.,
Petitioner (*Appellant below*), }
vs.
UNITED STATES OF AMERICA,
Respondent (*Appellee below*). }

**BRIEF OF THE STATE OF WASHINGTON
AS AMICUS CURIAE**

THE STATE OF WASHINGTON,
as amicus curiae,

By SMITH TROY,
Attorney General of the State of Washington,

GEORGE DOWNER,
Assistant Attorney General of the State of Washington,
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TABLE OF CONTENTS

	Page
Brief of the State of Washington as Amicus Curiae	3, 4, 5, 6

CASES CITED

Finch & Co. (Joseph S.) v. McKittrick, 305 U. S. 395....	4
Indianapolis Brewing Co. v. Liquor Control Comm., 305 U. S. 391.....	4
Mahoney v. Joseph Trinner Corp., 304 U. S. 401.....	4
State Board of Equalization v. Young's Market, 299 U. S. 59.....	4
Ziffin, Inc. v. Reeves, 308 U. S. 132.....	4

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1943

No.

WASHINGTON BREWERS INSTITUTE, a corporation, et al.,
Petitioner (*Appellant below*),
vs.
UNITED STATES OF AMERICA,
Respondent (*Appellee below*). }

}

**BRIEF OF THE STATE OF WASHINGTON
AS AMICUS CURIAE**

The STATE OF WASHINGTON files this brief as *amicus curiae* in support of a petition filed by the Washington Brewers Institute, a corporation, et al., petitioning that a writ of certiorari issue to review a judgment entered on the 13th day of August, 1943, by the United States Circuit Court of Appeals for the Ninth Circuit in a cause pending in that court entitled "Washington Brewers Institute, et al., appellants, v. United States of America, Appellee, No. 10303," the opinion being reported in 136 F. (2d) — (R. 174).

The liquor authority of the State of Washington has proceeded with the regulation of commerce in intoxicating liquors upon the assumption that the jurisdiction of the state in such matters is exclusive. This assumption has been based upon the interpretations of this Court as rendered in the following cases:

State Board of Equalization v. Young's Market, 299 U. S. 59;

Mahoney v. Joseph Trinner Corp., 304 U. S. 401; *Indianapolis Brewing Co. v. Liquor Control Comm.*, 305 U. S. 391;

Joseph S. Finch & Co. v. McKittrick, 305 U. S. 395; *Ziffin, Inc. v. Reeves*, 308 U. S. 132.

Regulations promulgated by the liquor authority of the State of Washington cover numerous phases of the manufacture, distribution, transportation and sale of intoxicating liquor, including credit restrictions, price posting, trade practices and advertising. Many of these regulations are proposed and intended to place restraints upon competitive business practices permissible and commonplace in other lines of business. It is the opinion of many students of the liquor problem that liquor traffic can be better regulated and controlled and social problems eliminated through the control of the economic factors influencing the persons licensed to engage in liquor traffic. To be more explicit, if licensees engaged in liquor traffic find themselves engaged in a price war where, through competitive practices their businesses may be sacrificed and lost, licensees may become heedless of the laws and regulations imposed for the control of social problems involved in liquor traffic. For this reason, it may be advisable for the liquor control authority of the State of Washington to impose regulations, if not prohibited by a

superior law, which regulations would affect trade practices in violation of the Sherman Anti-Trust Law.

Thus it becomes extremely important for the State of Washington to know whether or not its jurisdiction over the commerce of intoxicating liquor is or may be in any way restricted by national legislation enacted under the commerce clause of the Constitution. While existing laws and regulations of the State of Washington may or may not have the practical effect of fixing uniform prices for the sale of beer, it is readily conceivable that the liquor control authority may feel it advisable to call upon the malt beverage industry in its various phases to develop a uniform price structure as an element in bringing about sounder liquor control.

The Circuit Court of Appeals for the Ninth District, in its opinion, states in part:

"Thus the broad theory of the Sherman Act—that trade should be free of artificial restraints—is in many respects incompatible with the policy of state liquor-control legislation; and wherever such conflicts exist the Sherman Act must give way, just as the commerce clause itself gives way in identical circumstances. Where invocation of that Act tends to hamper or interfere with the enforcement of state laws regulatory of the transportation or importation of intoxicants, the Act is unenforceable."

At the outset of the above statement the Court indicates that should the Sherman Act in any respect become incompatible with the policy of the state law or regulation, it must give way. Later in the same statement it is indicated that only when state laws affecting transportation or importation are incompatible is the Sherman Act unenforceable.

Furthermore, the opinion holds that acts not in violation of State law are still subject to Federal jurisdiction, as indicated in the following language of the Court:

"In 1933 the original status was restored, and in effect the constitutional restriction upon the power of the states was deleted by adoption of the Twenty-First Amendment. Clear and explicit as is its language, that Amendment hardly admits of construction. While it does not in terms transfer power to the states it does free them from a previous constitutional restraint. As a matter of fundamental national law, the Amendment prohibits the transportation or importation of intoxicants into any state or territory for delivery or use therein in violation of the laws thereof. *Interstate commerce in liquor, not in violation of state laws, was left, as before, a matter of national concern.*" (Italics ours.)

Under the Court's conclusion, persons complying with State laws and regulations having to do with liquor traffic would be subject to indictment if those same acts violated any Federal statutes enacted under the Commerce Clause.

It is apparent that the Court's opinion is confusing. The State of Washington should definitely know how far it may proceed in imposing laws or regulations governing the traffic of intoxicants before it runs afoul of the restraints of the Sherman Act. It is apparent to all that no state should require conduct on the part of its citizens that will subject them, because of compliance, to prosecution by the Federal Government.

We therefore join in the petition for a writ of certiorari.

Respectfully submitted,

SMITH TROY,
Attorney General of the State of Washington,

GEORGE DOWNER,
Assistant Attorney General of the State of Washington,
Counsel for the State of Washington.

